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Nos. 84-801, 84-805

IN THE UNITED STATES SUPREME COURT

October Term, 1984

MIDLANTIC NATIONAL BANK,
Petitioner,

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

THOMAS J. O'NEILL,
Petitioner,

v.

CITY OF NEW YORK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

RONALD A. ZUMBRUN
ROBERT K. BEST
COUNSEL OF RECORD
TIMOTHY A. BITTLE
OF COUNSEL
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154

Attorneys for Amicus Curiae

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INTEREST OF AMICUS

Pursuant to Supreme Court Rule 36, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of petitioners. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, incorporated under the laws of California for the purpose of participating in litigation affecting public policy. An independent Board of Trustees authorizes participation in a case only when it concludes that Pacific Legal Foundation's position has broad public support. The Board of Trustees has authorized the filing of this brief.

Pacific Legal Foundation's public policy perspective in support of private property rights will help provide this Court with a more complete briefing of the interests at stake in this litigation.

OPINION BELOW

The opinions of the United States Court of Appeals are reported at 739 F.2d 912 (3d Cir. 1984), and 739 F.2d 927 (3d Cir. 1984).

STATEMENT OF THE CASE

Quanta Resources Corporation, a company which operated waste oil processing facilities, went into bankruptcy. A trustee was appointed to liquidate the company's assets for distribution to creditors. Among the company's assets were two storage facilities; one located in New York, and one located in New Jersey. Contaminated oil was discovered at both sites, in violation of

state environmental protection laws. The trustee decided that the cost to the estate of cleaning up these facilities exceeded their value. He therefore proceeded to abandon the assets back to Quanta, the party responsible for the violation. New York and New Jersey opposed the abandonment, claiming that the trustee must clean up the facilities, even if that meant using the other assets in the estate to pay for it. The trustee and creditors holding perfected security interests in other assets argued that the Just Compensation Clause of the Fifth Amendment would be violated if the government extinguished these security interests to pay for the cleanup. The Court of Appeals dismissed the "taking" claim in a footnote, stating:

> "[W]e are not persuaded by the Trustee's argument

> that an unconstitutional taking could result from forbidding abandonment here. ... [T]he state's enforcement of its environmental protection laws cannot be characterized as a taking; rather it is a permissible exercise of the state's regulatory power to promote the public good ...." Matter of Quanta Resources Corp., 739 F.2d at 922 n.11.

It is this summary dismissal of a claim to constitutional protections which amicus curiae wishes to address, because it "flatly contradicts clear

precedents of this Court." San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 647 (1981) (Brennan, J., dissenting).

SUMMARY OF THE ARGUMENT

The Court of Appeals did not decide whether Quanta's creditors "own" property of the estate to the extent that, if applied to other obligations of the bankrupt, they must be compensated. It never reached this question because the majority apparently concluded that the government's power to regulate for the public good could preempt the protections of the Fifth Amendment. This brief will demonstrate that the authority of government to take property for public use is a police power authority. When a valid exercise of this police power takes a protected

property interest the Fifth Amendment requires the government to compensate the owner or to withdraw the action.

ARGUMENT

I

PRELIMINARY STATEMENT: ISSUE PRESENTED

The Court of Appeals held that if the abandonment were denied, and other assets in the Quanta estate were applied under state law to clean up the New York and New Jersey facilities, it would be unnecessary to analyze whether a "taking" had occurred. The court based this holding on its conclusion that no "taking" could occur, because a state's enforcement of its environmental protection laws is a permissible exercise of the state's "regulatory power to promote the public good," or in other words, its police power. Matter

of Quanta Resources Corp., 739 F.2d at 922 n.11.

Amicus takes no position on whether these creditors would be entitled to compensation if the abandonment were denied. That question can be answered only by analyzing whether these creditors have a protected property interest (Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980)), which will be sufficiently interfered with so as to cause them to bear an unfair share of a public obligation. Armstrong v. United States, 364 U.S. 40, 49 (1960). Amicus believes, however, that these creditors are entitled to have their claims evaluated by a proper "taking" analysis. The issue thus presented is whether a "taking" could occur when a

state engages in a permissible exercise of its police power.

II

POLICE POWER ACTS THAT AFFECT PROPERTY MUST BE ANALYZED TO DETERMINE WHETHER COMPENSATION IS OWED

The police power is the power of government to serve the people for which it exists. Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 956 (1982). The police power authorizes government to undertake any measure deemed necessary, by the people's elected representatives, to protect the public health, safety, and welfare. Andrus v. Allard, 444 U.S. 51, 59 (1979); Eiger v. Garrity, 246 U.S. 97, 102-03 (1918). The government's authority to take or damage property for public use is one of the government's police power authorities. Hawaii

Housing Authority v. Midkiff, ___ U.S. ___, 81 L. Ed. 2d 186, 196 (1984); Berman v. Parker, 348 U.S. 26, 31-32 (1954). Thus, contrary to the suggestion by the majority of the Court of Appeals, there is no distinction between the government authority to take ownership of property and the authority to regulate that property. The ability to take property is merely a subsidiary power of the government's overall police power.

Governmental activities affecting property, then, are constrained by the same limitations placed on all exercises of the police power; that is, the activity must reasonably promote the public health, safety, or welfare. Hawaii Housing Authority v. Midkiff, 81 L. Ed. 2d

at 197 ("[t]he 'public use' requirement is thus coterminous with the scope of a sovereign's police powers"). Governmental activities affecting property which do not promote public health, safety, or welfare are therefore not permissible exercises of the government's police power. Thompson v. Consolidated Gas Utilities Corporation, 300 U.S. 55, 80 (1937).

On the other hand, governmental activities which do promote the public health, safety, and welfare are valid exercises of the police power regardless of whether such governmental activities take or damage property. Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264, 300 (1981). When valid exercises of the police power so affect property,

however, the Fifth Amendment requires the government to compensate the owner. In Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), this Court recently stated:

> "The Court of Appeals determined that § 828 serves ... legitimate public purpose[s] ... and thus is within the State's police power. We have no reason to question that determination. It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid." Id. at 425.

Again, in United States v. Security Industrial Bank, 459 U.S. 70

(1982), a case involving issues similar to those at bar, this Court repeated the rule that valid exercises of governmental power may nonetheless require compensation when property is affected.

> "It may be readily agreed that § 522(f)(2) is a rational exercise of Congress' authority .... Such agreement does not, however, obviate the additional difficulty that arises when that power is ... used to defeat traditional property interests. The bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation. ... Thus, however 'rational' the exercise of the

> bankruptcy power may be, that inquiry is quite separate from the question whether the enactment takes property [so as to require compensation]." United States v. Security Industrial Bank, 459 U.S. at 74-75.

The distinction between government action to regulate property and government action to take ownership in property is not, as suggested by the majority of the Court of Appeals, a distinction in the source or validity of the authority; rather, the distinction is in the remedy. An invalid exercise of the police power will be set aside, but when property is taken or damaged by valid regulation, the government is entitled to keep the property, or

inflict the damage, so long as it compensates the owner. Ruckelshaus v. Monsanto Co., ___ U.S. ___, 81 L. Ed. 2d 815, 841 (1984). Such compensation must be available "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. at 49; Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978). If government can "pre-empt" property rights by merely exercising its police power, "then the Taking Clause has lost all vitality." Ruckelshaus v. Monsanto Co., 81 L. Ed. 2d at 838.

Applying this body of law to the case at bar, the secured creditors

of Quanta have claimed a property interest in the assets of Quanta's estate which will be "taken" if abandonment of the New Jersey and New York facilities is disallowed. This claim of a "taking" does not arise from the direct application of the states' environmental laws. It arises from the potential transfer of liability from the culpable party to innocent creditors by requiring the trustee to accept responsibility for the cleanup costs. Therefore, contrary to the suggestion by the majority of the Court of Appeals, this case does not present a conflict between environmental regulation and protection of private property rights. The creditors do not argue that the environmental laws should not be enforced; their claim is that their

protected property interests may be taken. Having raised this claim, they are entitled to have a court analyze whether their claim is meritorious. The Court of Appeals, however, did not analyze whether the creditors have a valid "taking" claim. It avoided this question by finding that the states' enforcement of environmental protection laws was a valid exercise of their police power. The determination of the "taking" claim, however, should not turn on an analysis of the regulatory power employed. The question is whether the creditors would lose a protected property interest and be forced to bear more than their fair share of a public obligation. If so, compensation to

those individuals would be owed. United States v. General Motors Corp., 323 U.S. 373, 378 (1945).

CONCLUSION

For the reasons set forth above amicus requests this Court to expressly disapprove the Court of Appeals' conclusion that prohibiting abandonment cannot raise the question of an uncompensated taking of a protected property interest in violation of the protections of the Fifth Amendment.

DATED: April 5, 1985.

Respectfully submitted,

RONALD A. ZUMBRUN
ROBERT K. BEST
COUNSEL OF RECORD
TIMOTHY A. BITTLE
OF COUNSEL
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Telephone: (916) 444-0154

Attorneys for Amicus Curiae

DECLARATION OF SERVICE BY MAIL

I, Linda S. Schaupp, declare as follows:

I am a citizen of the United States, residing or employed in Sacramento, California.

My business address is 555 Capitol Mall, Suite 350, Sacramento, California.

I am over the age of 18 years, and am not a party to the above-entitled action.

On April 5, 1985, true copies of BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS were placed in envelopes addressed to:

Mr. William F. McEnroe
Nolan, O'Neill & Moore
60 Park Place
Newark, NJ 07102

Mr. Robert Abrams
Attorney General of the
State of New York
Mr. Norman Spiegel
Assistant Attorney General
2 World Trade Center
New York, NY 10047

Mr. Irwin I. Kimmelman
Attorney General of the
State of New Jersey
Mr. Richard F. Engel
Deputy Attorney General
C. N. 112
Trenton, NJ 08625

Mr. Frederick A. O. Schwarz, Jr.
Corporation Counsel for the
City of New York
Mr. Gary Tarnoff
Assistant Corporate Counsel
100 Church Street
New York, NY 10007

Mr. A. Dennis Terrell
Shanley and Fisher
131 Madison Avenue
Morristown, NJ 07960

which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 5th day of April, 1985, at Sacramento, California.

/s/ LINDA S. SCHAUPP
LINDA S. SCHAUPP